Petition

81-1577

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF ROGERS, ARKANSAS; OLIVER ADAMS; BOB CRAFTON; MARION BUNYARD; JOHN SAMPIER; CARL BAGGETT; GREER LINGLE and DR. BILL KING,
Petitioners,

vs.

PETE MCCLUSKEY, By His Next Friend, Sally McCluskey,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court may properly invalidate, on substantive due process grounds, a public school board's decision to suspend a tenth grade student for being intoxicated while on school premises in violation of school regulations, where the student presents no claim of deprivation of any specific fundamental constitutional right, and where the procedures followed in effecting the suspension were not unlawful?

2. Whether a federal court may properly invalidate the disciplinary sanction of a public school board, on grounds that an incorrect regulation was utilized by the school board, where other regulations clearly authorized the same disciplinary sanction and where it was held that there was no violation of procedural due process?

LIST OF PARTIES

Petitioner is the Board of Education of Rogers, Arkansas, the defendant in the District Court. Respondent is Pete McCluskey, by his mother Sally McCluskey, the Plaintiff in the District Court.

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THE BOARD OF EDUCATION OF ROGERS, ARKANSAS; OLIVER ADAMS; BOB CRAFTON; MARION BUNYARD; JOHN SAMPIER; CARL BAGGETT; GREER LINGLE and DR. BILL KING,
Petitioners,

VS.

PETE MCCLUSKEY, By His Next Friend, Sally McCluskey,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

OPINIONS BELOW

The district court's opinion is unreported; but recorded in the United States District Court, Western District of Arkansas, Fayetteville Division, Civil Case No. 80-5100, January 15, 1981, the Honorable Bruce M. Van Sickle, United States District Judge. The opinion of the United States Court of Appeals for the Eighth Circuit on which this petition is based is reported at 662 F.2d 1263 (1981), and the Order for Denial of the Petition for Rehearing was issued November 25, 1981.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 28, 1981. Timely petitions for rehearing were filed and denied by an equally divided court by entry of an Order of Denial of the Petition for Rehearing on November 25, 1981. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1) and seek reversal of the opinion below which affirmed the finding of the district court that the respondent was denied substantive due process when he was suspended by the Rogers Public School Board for his violation of a disciplinary rule which prohibits the use or possession of alcoholic beverages on school premises or at school-related activities. Review on certiorari is warranted by the conflict presented by the opinion sought to be reviewed and opinions of this Court in *Wood* v. *Strickland,* 420 U.S. 308 (1975) as to federal court jurisdiction to relitigate the proper construction of school regulations; *Board of Curators* v. *Horowitz,* 435 U.S. 78 (1978), as to the propriety of the concept of substantive due process in the school environment; and *Carey* v. *Piphus,* 435 U.S. 247 (1978), as to the propriety of judicial invalidation of disciplinary sanctions which were "wrongfully imposed", but which would or could have been imposed on the basis of other, "non-violative" criteria. The opinion sought to be reviewed also presents a conflict with another eighth circuit court opinion, *Scheelhaase* v. *Woodbury Central Community School District,* 488 F.2d 237 (8th Cir. 1973), *cert. denied* 417 U.S. 969 (1974), as to the applicability of substantive due process to decisions of school administrators; and also conflicts with similar holdings by other courts of appeals, *Jeffries* v. *Turkey Run Consolidated School District,* 492 F.2d 1 (7th Cir. 1974); *Murray* v. *West Baton Rouge Parish School Board,* 472 F.2d 438 (5th Cir. 1973).

STATUTES INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Consitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and also of *United States Code, Title 42, Section* 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Complaint herein was filed by a high school student (and his mother) of the Rogers, Arkansas School District, against the Board of Education or Rogers School District, alleging jurisdiction under 42 U.S.C. §1983; the actual basis for jurisdiction is presumably 42 U.S.C. §1343(3).

The action complained of was Respondent McCluskey's suspension on October 21, 1980, for the remainder of that semester, and loss of all credit for that semester's work. The suspension was the result of McCluskey's violation of a rule

which prohibited any student to use any alcolholic beverage on school premises or at any school-sponsored activity, when McCluskey was intoxicated on school grounds October 21, 1980. The Superintendent of Rogers Schools suspended McCluskey and also gave him notice of a hearing to be conducted concerning the suspension, which stated that he was charged with the violation of Sections 10 and 11 of the Disciplinary Rules. At the hearing, McCluskey did not deny that he had been intoxicated. (*McCluskey* v. *Board of Education of Rogers, Arkansas,* Civ. No. 80-5100, p.1 (W.D. Ark. January 15, 1981). The School Board affirmed the suspension for the remainder of the semester with loss of credit for the semester's work.

Section 10 of the disciplinary regulations clearly authorizes suspension for the balance of the term for alcohol offenses. Section 11 *requires* that punishment for drug and controlled substance offenses. (Slip Opinion, p. 3) The district court concluded that the school board had relied *exclusively* on Section 11 to impose the suspension, (*Id.*,p. 6), the mandatory regulation, which by its terms, was not applicable to alcohol-related violations, (*Id,* p. 4), in spite of testimony and evidence that both sections 10 and 11 were considered. On appeal to the court of appeals for the Eighth Circuit, the judgment was affirmed. The Court of Appeals held that the district court's findings that Section 11 could not reasonably be interpreted to apply to alcohol offenses, *McCluskey* v. *Board of Education of Rogers, Arkansas,* 662 F.2d 1263 (8th Cir. 1981), and that the school board expelled McCluskey under Section 11 of the Disciplinary Rules, were not clearly erroneous or unsupported by the record. *Id.*

Rehearing and rehearing en banc were denied, by an equally divided court. (November 25, 1981).

REASONS FOR GRANTING THE WRIT

Petitioner submits that the decision sought to be reviewed is in conflict with previous decisions of this Court and also of other courts of appeals, which have defined the parameter of federal court jurisdiction to intervene in the daily operations of our public schools; the decision sought to be reviewed conflicts as well with decisions of this Court which discredit the concept of substantive due process as a means to challenge the actions taken by public school boards, and finally the decision sought to be reviewed is in conflict with decisions of this Court which deny invalidation of the actions of school boards, even though based on impermissible factors, where the same action would be sanctioned by other "permissible" factors.

The specific issue in this case involves a school board's decision to suspend a student for impermissible behavior relating to intoxication on school premises. The grounds of the suspension do not involve the deprivation of any specific constitutional right, but are challenged on the contention that the decision to suspend was based on an inappropriate section of the school's disciplinary rules (Section 11) even though suspension for that offense is sanctioned by another section of the rules (Section 10). The decision of the district court, which was affirmed by the court of appeals, invoked the discredited concept of substantive due process to invalidate the public school board's disciplinary action, in spite of the fact that the district court found no violation of procedural due process by the school's notice to respondent that disciplinary measures would be taken under *both* Sections 10 and 11 of the school's policies. The student, McCluskey did not deny the offense, nor did he deny that the suspension was authorized under Section 10 of the Disciplinary Rules. Neither has McCluskey asserted the deprivation of any specific constitutionally protected right.

The judicial invalidation of a public school board's disciplinary sanction without any accompanying deprivation of

constitutionally protected rights cannot be reconciled with the admonitions concerning federal court intervention in the matters of public school administration which have been consistently expressed in decisions by the Supreme Court.

The Supreme Court of the United States has repeatedly warned against unwarranted intrusions by the federal courts in the daily operations of this nation's public schools. Although "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960), nevertheless the Court has ". . . repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, *to prescribe and control conduct in the schools.*" *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 507 (1969) (Emphasis supplied). And in *Epperson* v. *Arkansas,* 393 U.S. 97, (1968), the Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. 393 U.S. at 104.

In *San Antonio School District* v. *Rodriquez,* 411 U.S. 1 (1973), *rehearing denied,* 411 U.S. 959 (1973). The Court discussed various ways in which the State of Texas had exerted its legitimate interest in local control of its educational programs, referring specifically to the state's assumption of the power and

responsibility "to maintain order and discipline ... including the prerogative to suspend students for disciplinary reason ..." *Id* at 51-52. While recognizing that a public school student has substantive rights while at school, the Court has nevertheless concluded that "... §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings *or the proper construction of school regulations.*" (Emphasis added) *Wood* v. *Strickland, Supra* at 326.

Application of the foregoing directives to the facts herein quickly reveals that federal judicial intrusion is unwarranted. The facts do not state any fundamental constitutional right which is being jeopardized; no violation of procedural due process was found, and the respondent has never denied his offensive conduct. These facts are strikingly similar to those in which this Court advised judicial restraint in *Wood* v. *Strickland:* the suspension of a student who did not deny an alcohol-related offense, and for which where were no procedural violations. It is submitted by Petitioner that the message of *Wood* and other decisions by this Court is clear on these facts: federal judicial intercession is unwarranted in the absence of any constitutionally protected right, and §1983 does not authorize judicial review of the proper construction of school regulations.

This Court rejected the court of appeals' finding of a violation of substantive due process in *Strickland* v. *Inlow,* 485 F.2d 186 (8th Cir. 1973), stating that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood* v. *Strickland, supra* at 326. Petitioner respectfully submits that the concept of substantive due process is not applicable to a student's challenge to a disciplinary decision, where, as here, no specifically identifiable and protected constitutional interest is implicated. Any conclusion to the contrary would invalidate every incorrect decision resulting from official

actions, whether or not the decision was arbitrary or was, in fact, based on sufficient evidence. That result is clearly contrary to decisions of this Court which refuse to treat mere error in official decision-making as due process violations. See, *e.g.*, *Lavine* v. *Milne*, 424 U.S. 577 (1976), (The Fourteenth Amendment does not guarantee that all decisions by state officials will be correct.); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, (1949), ("It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so."); *Gryer* v. *Burke*, 334 U.S. 728, 731 (1948), ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."); *Snowden* v. *Hughes*, 321 U.S. 1 (1944), *rehearing denied*, 321 U.S. 804 (1944), ("A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored.")

Decisions of the lower federal courts have also rejected the concept of substantive due process against "arbitrary and capricious" conduct by school authorities. See, *e.g.*, *Jeffries* v. *Turkey Run Consolidated School District, Supra, Scheelhaase* v. *Woodbury Central Community School District, Supra, Freeman* v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969).

Many cases have likewise refused to apply the doctrine of substantive due process in the school context where it was asserted that any arbitrary, capricious or unreasonable action taken by school authorities should be held invalid under the Federal Constitution. See, *e.g.*, *Jeffries* v. *Turkey Run Consolidated School District, Supra. Scheelhaase* v. *Woodbury*

Central Community School District, Supra, Freeman v. *Gould Special School District, Supra.* In fact, that was the very essence of the Supreme Court's reasoning in the non-tenured teacher cases where it was held that such a teacher had no protected federal interest and therefore no right to demand from school authorities a statement of the reasons for the non-renewal of teaching contracts, nor an opportunity to be heard in connection therewith. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, (1972).

Jeffries, supra, instructively states the issue and we submit, reaches the proper conclusion. There, a school teacher who admittedly had no constitutional right to procedural due process in connection with the non-renewal of her teaching contract, nevertheless filed suit under 42 U.S.C. §1983 alleging that she was protected by the concept of substantive due process against "arbitrary and capricious" action of the school authorities. 492 F.2d at 2. Describing her Complaint, the Court states:

> She makes no claim to tenure as a matter of state law, but does allege a violation of her constitutional rights because the defendants' decision was made 'for reasons which are arbitrary and capricious, being wholly without basis in fact or in logic.' 492 F.2d at 2.

The Court's discussion proceeds:

> The claim that a person is entitled to 'substantive due process' means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis—that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.' Since standards of 'irrationality' or 'arbitrariness' vary from time to time and from judge to judge, applications of the concept—indeed, the concept itself—have generated serious criticism of the judiciary and the judicial function. (footnotes omitted) In this case we need not apprise the viability of the concept,

> or the extent to which it authorizes federal judges to impose their own views about what is 'unrelated to the education process or to working relationships within the educational institution' upon locally elected school boards. (citing *Drown* v. *Portsmouth School District,* 451 F.2d 1106, 1108 (1st Cir. 1971)). For the same critical objection to any procedural due process claim by the plaintiff also forecloses her argument based on 'substantive due process.'
>
> The Fourteenth Amendment prevents the state from depriving any person of liberty or property without due process of law. As *Roth* squarely holds, the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument. 492 F.2d at 3, 4.

Likewise, the Court in *Jeffries* foresaw the same consequences as did Chief Judge Mehaffy in his dissent in *Strickland* if the concept of substantive due process were applied. The Court notes:

> ... Plaintiff seems to argue that, entirely apart from her position as a teacher, as a citizen she has a 'substantive right to be free from arbitrary and capricious governmental action.' ... She does not identify the source of any such right, but necessarily must be contending that it is an interest in 'liberty' protected by the Fourteenth Amendment ... . In practical terms, if her argument were valid, every time a citizen was affected by governmental action, he would have a federal right to judicial review. 492 F.2d at 4, Note 8.

The Court then concludes that no such result should follow, "in view of contemporary reluctance to embrace the concept of substantive due process." *Id.* See *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, (1973); *Truax* v. *Corrigan*, 257 U.S. 312, 344, (1921) (dissenting opinion of Mr. Justice Holmes.) The matter could not be more succinctly put than in *Murray* v. *West Baton Rouge Parish School Board*, 472 F.2d 438, 444 (5th Cir. 1973) where it is stated:

> In order to avoid any misinterpretation and even at the risk of redundancy, we conclude by emphasizing that the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school fence is not constitutionally offensive. Although we shall not hesitate to use our constitutional clippers where appropriate, we cannot forget that a public school principal retains considerable freedom to administer his realm. For better or for worse, *our jurisdiction attaches only when the Constitution has been violated—not every time a principal acts arbitrarily or unfairly.* In affirming the dismissal of this claim we are in no way passing on the propriety or wisdom of the disciplinary and testing practices of West Baton Rouge Parish. We merely held that on the facts of this case, plaintiffs have totally failed to prove a deprivation of any constitutional right. (Emphasis supplied).

Petitioners' position here is supported by the Supreme Court's opinion in *Board of Curators* v. *Horowitz, Supra.* There the Court questioned the propriety of the use of the substantive due process concept in the school environment although the decision challenged there was an academic, not disciplinary, one. The opinion is nevertheless instructive. Noting that the lower court had not reached the substantive due process issue, the Supreme Court states:

> In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can

> be enjoined if "shown to be clearly arbitrary or capricious." *Mahavongsanan* v. *Hall, supra,* 529 F.2d, at 449. See *Gaspar* v. *Bruton, supra,* 513 F.2d, at 850, and citations therein. Even assuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decisionmaking. 435 U.S. at 91.

In Note 8 the Court observes:

> Respondent also contends that petitioners failed to follow their own rules respecting evaluation of medical students and that this failure amounted to a constitutional violation under *Service* v. *Dulles,* 354 U.S. 363 (1957). We disagree with both respondent's factual and legal contentions. [As for the facts, the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent, as with the practical "appeal" that petitioners allowed respondent to take. * * * As for the legal conclusion that respondent draws, both *Service* and *Accardie* v. *Shaughnessy,* 347 U.S. 260 (1954), upon which *Service* relied, enunciate principles of federal administrative law rather than of constitutional law binding upon the States.]. 435 U.S. at 92.

Finally, we call the Court's attention to Judge Bright's concurring opinion in *Scheelhaase* v. *Woodbury Central Community School District, Supra,* stating: "The concept of substantive due process is not wholly alien to the administration of public schools." However, Judge Bright continued that there was in his judgment no showing of arbitrary or capricious action even

though the decision complained of was possibly erroneous. He concluded for that reason, "We need not spell out the dimensions or limitations of that doctrine (substantive due process) here." (Parenthetical added). *Id* at 244. The lower court has now done so—erroneously, we submit.

The decision of the court of appeals in this case would authorize federal court intervention in the day to day operation of the public schools anytime a disciplinary action is alleged to be "unreasonable." That result is patently contrary to the position of this Court and other courts of appeals.

The decision of the district court rested upon a determination that the school board had unreasonably suspended a student for intoxication on school premises in reliance on a section of the disciplinary rules which did not include alcohol-related offenses (Section 11). The court took small consideration of the fact that such a suspension is specifically authorized in Section 10, or that Section 9 authorizes the board to expel a student for good cause. Indeed, the court's conclusion that the school board relied *exclusively* on Section 11 to impose the suspension was in spite of evidence that written notice to the student referred to *both* Sections 10 and 11, that the board's decision was preceded by considered deliberation and a Motion to Suspend based exclusively on Section 10, as well as witness testimony that both Sections were considered. But even if the court correctly concluded that suspension was improperly based on Section 11, the discipline still should not be invalidated. Decisions of this Court have rejected just such a result where the same decision may be reached by the Board under other authority.

In *Mt. Healthy* v. *Doyle,* 429 U.S. 274 (1977), a non-tenured teacher whose release from employment was in violation of her First Amendment rights, was not entitled to reinstatement since the same decision could have been made by the Board of Education based on other, unprotected conduct of the teacher. It is

submitted that *Doyle* is analagous here since the Board of Education could have made the same decision to suspend McCluskey based on either Section 10 or Section 11 of the Disciplinary Rules. The facts of this case amply demonstrate that the error (if any) committed by the School Board was in making any reference to Section 11 during the proceedings under the assumption that it encompassed alcohol-related conduct, since their decision was clearly authorized under both Sections 9 and 10, if not specifically by Section 11.

Not only is judicial interposition unwarranted in this case, but a retreat is required to maintain uniformity with the foregoing decisions and also to forstall the spectre of unlimited challenges to every disciplinary action within the administration of public schools which adversely affects an individual on the grounds that it is "arbitrary," "capricious," or "unreasonable." That is a right which the constitution does not guarantee to the individual; the right to be free from arbitrary action of another is not one which could easily be protected against in our imperfect society, if at all. Rather, fairness of procedure is due process in the primary sense, *Fitzgerald* v. *Hampton,* 467 F.2d 755, (D.C. Cir. 1972), and the manner in which the school board conducted the proceedings regarding McCluskey undeniably met those standards in providing a "concerned hearing in depth to the issues." (Transcript of D. Ct. Hearing p. 77) which "cannot be faulted for the way it went about its analysis of the fact material." (*Id.,* p. 78). There is absolutely no basis for McCluskey's due process complaint: he received more than adequate notice, a fair and impartial hearing and the action taken was not only specifically authorized, but has been effectively and consistently applied in all similar cases over the years. The School Board, however, will be greatly disadvantaged if judicial intrusion is allowed to invalidate their disciplinary action simply because more than one disciplinary rule was referred to during the proceedings.

CONCLUSION

For the foregoing reasons, and in view of the conflict between the opinion below and the holdings of this Court in *Wood, Horowitz, Mt. Healthy* v. *Doyle,* and *Carey* v. *Piphus,* and the opinions of other courts of appeals as well as opinions rendered within the Eighth Circuit, a Writ of Certiorari should issue to review the opinion of the Court of Appeals for the Eighth Circuit as to the findings of a substantive due process violation, notwithstanding the fact that no constitutional right is presented, no procedural due process error was found, and the action taken by the school board was clearly authorized within their rules and regulations.

Respectfully submitted,

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Appendix

APPENDIX

Page

A. Opinion, *McCluskey* v. *Board of Education of Rogers, Arkansas, et al,* 662 F.2d 1263 (8th Cir. 1981), ... A-1
(The opinion sought to be reviewed).

B. Judgment and Opinion, *McCluskey* v. *Board of Education of Rogers, Arkansas, et al,* Civ. No. 80-5100 (W.D. Ark., January 15, 1981), Bruce Van Sickle, U.S. District Judge. A-10

C. Order denying rehearing, U.S. Court of Appeals, Eighth Circuit, November 25, 1981. ..... A-19

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1132

Pete McCluskey, By His Next Friend Sally McCluskey,
Appellee,

v.

The Board of Education of Rogers, Arkansas; Oliver Adams, Bob Crafton, Marion Bunyard, John Sampier, Carl Baggett, Greer Lingle and Dr. Bill King,
Appellants.

Appeal from the United States District Court
for the Western District of Arkansas

Submitted: September 18, 1981
Filed: October 28, 1981

Before STEPHENSON and McMILLIAN, Circuit Judges, and HANSON,* Senior District Judge.

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* The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

STEPHENSON, Circuit Judge.

The Board of Education of Rogers, Arkansas (Board)[1] appeals the district court's[2] decision voiding the Board's October 29, 1980, suspension of appellee Pete McCluskey for the remainder of the school semester because the suspension hearing violated McCluskey's right to substantive due process. The district court required the Board to change McCluskey's record by omitting all references to the October 29 suspension and by granting him academic credit for the semester. The Board contends that the district court erred in determining that McCluskey was suspended under section 11, rather than section 10, of the school's disciplinary policies. Alternatively, the Board argues that even if section 11 was used, the court erred in ruling that the Board could not interpret section 11 to apply to alcohol offenses. We affirm the district court.

I. BACKGROUND

Pete McCluskey and four other Rogers school district students left school after the first period class on October 21, 1980. The boys had some drinks and McCluskey became intoxicated. When McCluskey and his friends returned to school to go on a scheduled band trip, McCluskey was told he was suspended, effective the following day.

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[1] The following people are also defendants-appellants in this case: Rogers School Board Members, Oliver Adams, Bob Crafton, Marion Bunyard, John Sampier and Carl Baggett; Rogers Superintendent of Schools, Greer Lingle; and the principal of Rogers High School, Dr. Bill King. Reference to appellant Board in this opinion also includes reference to the above-listed appellants.

[2] The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota, presiding.

On October 22, 1980, a disciplinary referral form was given to McCluskey's parents. The form notified the family that McCluskey was "suspended pending an expulsion hearing before the Rogers School Board." On October 23, 1980, Vice Principal Moore sent a letter to the superintendent informing him that the high school administrators recommended that McCluskey and two other boys be expelled for the first semester for violating sections 10 and 11 of the school's disciplinary policies. Also on October 23, the superintendent mailed a letter to McCluskey's mother notifying her of the administrator's recommendation and of a hearing on October 29, 1980, before the Rogers School Board regarding the disciplinary action to be taken against McCluskey.

Before the hearing date it became known that five boys had been involved in the drinking incident and all five students were given a separate hearing on October 29, 1980. None of the students denied drinking and the Board ultimately voted to expel all five for the remainder of the first semester.

On November 11, 1980, the Board amended its disciplinary policy so that alcohol-related offenses were covered under section 11, which mandates expulsion for the remainder of the semester, and reference to alcohol was deleted from section 10, which does not require but does allow expulsion for varying lengths of time.

McCluskey filed a petition for temporary and permanent injunctive relief on November 13, 1980, alleging that the manner in which the Rogers School Board regulations were enforced denied him due process. The section 1983 case was tried to the court on December 4, 1980, and the court ruled that the expulsion decision of the Board violated the substantive due process rights of McCluskey.

II. ANALYSIS

A. The Section Used By The Board

The district court made a finding of fact that the Board used section 11,[3] which requires expulsion for the remainder of the semester in expelling McCluskey for the remainder of the semester. The court noted that section 10[4] is the section that addresses alcohol offenses and that, unlike the mandatory language of section 11, section 10 does not require expulsion for the remainder of the semester. "Under Section 10, the board must decide not only if the student has violated the regulation, but also whether the violation warrants suspension and if so, the length and terms of such suspension." *McCluskey* v. *Board of Education,* No. 80-5100 (W.D. Ark. Jan. 15, 1981). The court then concluded that section 11 could not reasonably be interpreted to apply to alcohol offenses; therefore, the Board violated McCluskey's substantive due process rights when it expelled him for an alcohol offense under section 11.

---

[3] Section 11, in part, provides as follows:

> For the protection of other pupils in the school grades 9-12, the school board *shall* expel for the remainder of the semester with loss of credit for the semester's work any pupil whenever it has been established to the satisfaction of the board, or the superintendent, or the principal, or his assistant in charge, that the pupil has on school premises or at school sponsored activities (including trips) used, sold, been under the influence of, or been in possession of narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended.

[4] Section 10, in part, provides as follows:

> Insubordination; * * * use or possession of alcoholic beverages or of illegal drugs; * * * or other conduct that would tend to disrupt the educational process or harm the other students or school officials shall constitute good cause for suspension or expulsion from school.

The Board argues that the district court's finding that McCluskey was expelled under section 11 instead of under section 10 is unsupported by the record and is clearly erroneous. The Board relies on exhibits showing that section 10, as well as section 11, was cited in the two October 23, 1980 letters: Vice Principal Moore's letter to the superintendent and the superintendent's letter to Mrs. McCluskey. Also, the Board argues that the court ignored the testimony of Adams, a Board member. Adams, a lawyer and a defendant in this case, stated that because he had doubts as to the applicability of section 11, he based his motion to expel McCluskey for the remainder of the semester on section 10.

Our review of the district court's basic fact findings is limited by the clearly erroneous rule. Fed. R. Civ. P. 52(a). *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman,* 593 F.2d 129, 131 (8th Cir.), *cert. denied,* 444 U.S. 839 (1979). "Findings of fact made by a trial court in a case submitted to the court without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Kendrick* v. *Commission of Zoological Subdistrict,* 565 F.2d 524, 526 (8th Cir. 1977). As an appellate court, it is not our function to try the case *de novo. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman, supra,* 593 F.2d at 131.

We cannot say that the challenged fact findings are clearly erroneous. The evidence included testimony from the school principal that the Board had used section 11 in past alcohol cases and that it was the Board's policy to expel for a full semester for alcohol offenses regardless of the other facts and circumstances in an individual case. The chairman of the Board stated that section 11 had been consistently used in alcohol cases for the past four or five years and that the Board was of the opinion that alcohol was a controlled substance under Arkansas Act 590. Section 11 specifically refers to Arkansas Act 590. Adams also

testified that since he had been on the Board, the policy had been to expel for a full semester regardless of the circumstances. Additionally, Adams stated that the Board's action, amending the disciplinary policy to include alcohol under section 11 and to omit reference to alcohol in section 10, reflected the Board's consistent policy throughout the past several years.

Even though Adams testified he made the motion regarding McCluskey's expulsion under section 10, he admitted that he did not know under what section the motion to expel was made for three of the other boys whose hearings had been held that same night. The district court discredited the portion of Adams' testimony concerning his claim that he had made the motion regarding McCluskey under section 10. "Only in exceptional circumstances will a district court decision which turns on matters of credibility be reversed." *Stanley* v. *Henderson,* 597 F.2d 651, 653 (8th Cir. 1979). The circumstances here are not exceptional and the court's determination that the Board utilized section 11 in expelling McCluskey for the full semester is supported by substantial evidence and is not clearly erroneous.

B. The Board's Interpretation Of Section 11

The district court carefully analyzed the Board's application of section 11 in alcohol cases and stated:

> We hold that plaintiff was denied substantive due process by the unreasonable actions of the school board in suspending plaintiff under Section 11 of the Policies for Pupil Suspension since there was absolutely no indication that plaintiff had been involved with any substance other than alcohol.
>
> In *Wood* v. *Strickland,* 420 U.S. 308 (1975), the school board of Mena, Arkansas, had suspended two high school girls for "spiking" the punch at a school party by adding a malt liquor which had an alcohol content of 3.2%. The

school regulation prohibited the possession or use on campus of "intoxicating beverages." The Eighth Circuit Court of appeals held that the terms in the school regulation was co-equal with a statutory definition of"intoxicating liquor"and referred only to those beverages with an alcoholic content in excess of 5%. Finding that there was no evidence to support the conclusion that the girls had possessed or used a beverage with an alcoholic content in excess of 5%, the appellate court held that the school had violated the students' rights to substantive due process. *Strickland* v. *Inlow,* 495 F.2d 186 (8th Cir. 1973).

The United States Supreme Court reversed, holding that the term "intoxicating beverage" as used in the school regulation was not confined to the statutory definition. The school had interpreted its regulation to apply to any beverage containing alcohol. Since the school's construction of the regulation was a reasonable one, the United States Supreme Court held that the Court of Appeals should not have supplanted its interpretation for that of the school officials. *Wood* v. *Strickland,* 420 U.S. 308, 324-325 (1975).

In the case at bar, various school board members testified that they interpreted Section 11 of the Policies for Pupil Suspension as applying to all "drugs" including alcohol. We hold that Section 11 cannot reasonably be interpreted to apply to alcohol.

By its own terms, Section 11 relates only to "narcotics or other hallucinogenics, drugs or controlled substances classified as such by Act 590 of 1971, as amended." The Act specifically exempts alcohol. Ark. Stat. Ann. § 82-2602(e).

The term "drug" has traditionally meant a substance used in the treatment or prevention of disease whereas

> "alcohol" has customarily been a beverage associated with food and nourishment. In common parlance, the term "drug" does not connote alcohol, as demonstrated by the ordinary meaning of "drug store" and "drug addict."
>
> One must abandon the ordinary meaning and adopt a technical definition to find that alcohol is a "drug." If such a technical definition is adopted, all comestibles would be included because they all have a chemical effect on the human body. There is a body of data tending to establish that sugar impedes the workings of the human brain. To describe sugar as a drug may be technically correct and may even be a laudatory attempt to call attention to its deleterious effects on the human body, but such technical definitions coupled with laudatory purposes do not affect its ordinary meaning. To abandon the ordinary meaning of the term in interpreting Section 11 of the Policies of Pupil Suspension is to give the word an unreasonable meaning.

McCluskey v. *Board of Education, supra,* No. 80-5100 (W.D. Ark. Jan. 15, 1981).

The Board argues that *Wood* prevents the court from concluding that the Board could not legally construe section 11 to be applicable to alcohol offenses. The Supreme Court stated that "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings *or the proper construction of school regulations.*" *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975) (emphasis added). The Board contends that the district court's rejection of the Board's interpretation of section 11 as applying to alcohol offenses is similar to the court of appeals in *Wood* substituting its judgment for the board in ruling that a regulation prohibiting "intoxicating" beverages must incorporate the state's statutory standards and thus require proof that the beverage is *legally* intoxicating. Since in *Wood* the Supreme Court reversed the court

of appeals and ruled that the board could apply its regulation to any beverage containing alcohol, the *McCluskey* Board argues that it likewise has the freedom to interpret its section 11 regulation and it can construe it to apply to alcohol. *See Wood* v. *Strickland, supra,* 420 U.S. at 323-28.

We hold that the district court correctly distinguished *Wood* by stating that the *Wood* board's construction of the regulation was a reasonable one while the *McCluskey* Board's construction of section 11 is unreasonable. We cannot agree with the Board that it can apply section 11's mandatory expulsion penalty to a student involved in an alcohol case when the express terms of section 11 apply only to "drugs" and expressly exempt alcohol.

We have examined the Board's other arguments challenging the district court's decision and we find them unconvincing. We affirm the district court.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I would reverse the district court on the basis of the reasoning in *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Civil No. 80-5100

Pete McCluskey, By His Next Friend, Sally McCluskey,
Plaintiff,

v.

The Board Of Education Of Rogers, Arkansas, Oliver Adams, Bob Crafton, Marion Bunyard, John Sampier, Carl Baggett, Greer Lingle and Dr. Bill King,
Defendants,

and

Pete McCluskey, By His Next Friend, Sally McCluskey,
Ex Parte.

JUDGMENT

On this January 19, 1981, pursuant to the Memorandum Opinion of the Court filed herein on January 15, 1981, and in accordance therewith,

IT IS ADJUDGED that plaintiff's October 29, 1980, suspension from the Rogers High School is void.

Defendants are hereby ordered to strike out and expunge from the records of the Rogers High School all references to plaintiff's October 29, 1980, suspension. Defendants are further ordered to modify the records of the Rogers High School by granting plaintiff academic credit for the semester ending in December, 1980, for those courses in which plaintiff was enrolled on October 21, 1980.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

Civil No. 80-5100

Pete McCluskey, By His Next Friend, Sally McCluskey,
Plaintiff,

v.

The Board Of Education Of Rogers, Arkansas, Oliver Adams, Bob Crafton, Marion Bunyard, John Sampier, Carl Baggett, Greer Lingle and Dr. Bill King,
Defendants,

and

Pete McCluskey, By His Next Friend, Sally McCluskey,
Ex Parte.

MEMORANDUM OPINION

This is a 42 U.S.C. § 1983 action in which plaintiff, a minor, challenges his suspension from the Rogers High School. This Court has subject matter jurisdiction under 28 U.S.C. § 1983. Trial to the Court occurred on December 4, 1980.

On October 21, 1980, plaintiff, Pete McCluskey, left school without permission to go drinking with his friends. Plaintiff became intoxicated. When the school learned of his whereabouts, they caused him to return to the school grounds. He was told he was suspended, effective the following day.

On October 23, 1980, the Superintendent of the Rogers Public Schools mailed plaintiff's mother notice of a hearing concerning plaintiff's suspension to be held by the school board on October 29, 1980. The notice stated that plaintiff was accused of reporting to school under the influence of alcohol and that

the school administrators would seek to have plaintiff suspended under Sections 10 and 11 of the written Policies on Pupil Suspension.

On October 29, 1980, plaintiff and his mother appeared at the hearing. They did not challenge the fact of plaintiff's intoxication. The school administrators produced the testimony of several persons concerning the events of October 21. Some of the testimony was hearsay. The school board announced that plaintiff would be suspended under Section 11 of the written Policies on Pupil Suspension, a section which mandates suspension for the remainder of the semester with loss of all credit for the semester's work. At trial, some members of the school board testified that they believed they had the right to exercise discretion under Section 11 despite its mandatory language. They also testified in deciding to suspend plaintiff, they did not consider his academic history, behavior record or ameliorating or aggravating circumstances surrounding the events of October 21, but relied upon the mandatory language of Section 11.

Section 11, in part, provides as follows:

> For the protection of other pupils in the school grades 9-12, the school board *shall* expel for the remainder of the semester with loss of credit for the semester's work any pupil whenever it has been established to the satisfaction of the board, or the superintendent, or the principal, or his assistant in charge, that the pupil has on school premises or at school sponsored activities (including trips) used, sold, been under the influence of, or been in possession of narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended.

Act 590 of the Acts of Arkansas of 1971 is codified in Ark. Stat. Ann. §§ 82-2601 *et seq.* The Act enumerates the substances to which it applies and classifies them into six "schedules." Alcohol is not listed and the Act specifically exempts "distilled

spirits, wine, malt beverages or tobacco." Ark. Stat. Ann. § 82-2602(e).

Sections 9 and 10 of the school's written Policies on Pupil Suspension provide, in part, as follows:

Section 9.

> The school board shall determine whether or not a suspension, upon which the board has held a hearing, should be revoked, affirmed or altered, subject to the provisions of Sections 10 and 11 of these policies and may expel, for good cause, any pupil in the school district.

Section 10.

> Insubordination; . . . sale, use or possession of alcoholic beverages or illegal drugs; . . . or other conduct that would tend to disrupt the educational process or harm the other students or school officials shall constitute good cause for suspension or expulsion from school. . . .

A student at a public school has property and liberty interests in attending public schools which are protected by the Fourteenth Amendment. *Goss* v. *Lopez,* 419 U.S. 565 (1974). Procedural due process, as it is applied to the expulsion or suspension of students for more than a de minimis amount of time, requires that the student be given notice of the charges against him and an opportunity to rebut those charges. *Goss* v. *Lopez, ibid.* Substantive due process requires that the school act reasonably in promulgating and applying the regulations which govern student expulsion or suspension and it protects the student from arbitrary and capricious discipline. *Strickland* v. *Inlow,* 495 F.2d 186 (8th Cir. 1973), *rev'd* on other grounds, *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Plaintiff contends that he was denied due process with respect to the suspension which occurred following the hearing on October 29, 1980. Plaintiff does not challenge the validity of the interim suspension of October 22, 1980.

Procedural Due Process

A notice which meets the requirements of a criminal indictment or information is sufficient, as a matter of law, to satisfy the notice requirements for students facing disciplinary action. *Counts* v. *Voorhees College,* 312 F.Supp. 598 (D. S.C. 1970), *aff'd* 439 F.2d 723 (4th Cir. 1971). If an indictment charging two or more offenses contains a defect with respect to one charge, the entire indictment is not void; the defective portion of the indictment should merely be ignored. *United States* v. *Strauss,* 283 F.2d 155 (8th Cir. 1960).

Since the notice incorrectly referred to Section 11 of the Policies on Pupil Suspension and also correctly referred to Section 10, we hold that the defect was surplusage which did not render the notice inadequate.

The admittance of hearsay evidence during a suspension hearing does not constitute a denial of procedural due process. *Boykins* v. *Fairfield Board of Education,* 492 F.Supp. 697, 701 (5th Cir. 1974).

Substantive Due Process

We hold that plaintiff was denied substantive due process by the unreasonable actions of the school board in suspension plaintiff under Section 11 of the Policies for Pupil Suspension since there was absolutely no indication that plaintiff had been involved with any substance other than alcohol.

In *Wood* v. *Strickland,* 420 U.S. 308 (1975), the school board of Mena, Arkansas, had suspended two high school girls for "spiking" the punch at a school party by adding a malt liquor which had an alcohol content of 3.2%. The school regulation prohibited the possession or use on campus of "intoxicating beverages." The Eighth Circuit Court of Appeals held that the term in the school regulation was co-equal with a statutory

definition of "intoxicating liquor" and referred only to those beverages with an alcoholic content in excess of 5%. Finding that there was no evidence to support the conclusion that the girls had possessed or used a beverage with an alcoholic content in excess of 5%, the appellate court held that the school had violated the students' rights to substantive due process. *Strickland* v. *Inlow,* 495 F.2d 186 (8th Cir. 1973).

The United States Supreme Court reversed, holding that the term "intoxicating beverage" as used in the school regulation was not confined to the statutory definition. The school had interpreted its regulation to apply to any beverage containing alcohol. Since the school's construction of the regulation was a reasonable one, the United States Supreme Court held that the Court of Appeals should not have supplanted its interpretation for that of the school officials. *Wood* v. *Strickland,* 420 U.S. 308, 324-325 (1975).

In the case at bar, various school board members testified that they interpreted Section 11 of the Policies for Pupil Suspension as applying to all "drugs" including alcohol. We hold that Section 11 cannot reasonably be interpreted to apply to alcohol.

By its own terms, Section 11 relates only to "narcotics or other hallucinogenics, drugs or controlled substances classified as such by Act 500 of 1971, as amended." The Act specifically exempts alcohol. Ark. Stat. Ann. § 82-2602(e).

The term "drug" has traditionally meant a substance used in the treatment or prevention of disease whereas "alcohol" has customarily been a beverage associated with food and nourishment. In common parlance, the term "drug" does not connote alcohol, as demonstrated by the ordinary meaning of "drug store" and "drug addict."

One must abandon the ordinary meaning and adopt a technical definition to find that alcohol is a "drug." If such a

technical definition is adopted, all comestibles would be included because they all have a chemical effect on the human body. There is a body of data tending to establish that sugar impedes the workings of the human brain. To describe sugar as a drug may be technically correct and may even be a laudatory attempt to call attention to its deleterious effects on the human body, but such technical definitions coupled with laudatory purposes do not affect its ordinary meaning. To abandon the ordinary meaning of the term in interpreting Section 11 of the Policies of Pupil Suspension is to give the word an unreasonable meaning.

Having found that Section 11 cannot reasonably be construed to apply to alcoholic beverages, we hold that the defendants violated plaintiff's rights to substantive due process when they suspended him, as by their own admission, they relied exclusively on Section 11.

Section 10 of the Policies for Pupil Suspension addresses the use of alcohol. It provides that the use or possession of alcohol "shall constitute good cause for suspension," whereas Section 11 mandates suspension for the remainder of the semester with loss of academic credits for the semester. Under Section 10, the board must decide not only if the student has violated the regulation, but also whether the violation warrants suspension and if so, the length and terms of such suspension. Both decisions are to be made by the board under Section 10.

Ark. Stat. Ann. § 80-1516 provides as follows:

> 80-1516. Suspension of pupils—Causes—Right to appeal.—The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness, or other conduct that would tend to impair the discipline of the school, or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to sus-

> pend any pupils, subject to appeal to the board. All school board meetings entertaining such appeals shall be conducted in executive session if requested by the parent or guardian of the student, provided that after hearing all testimony and debate the school board shall conclude the executive session and reconvene in public session to vote on such appeal.

The statute vests the school board with the ultimate responsibility for suspension of students. In 1979, the Arkansas legislature mandated that school boards adopt written policies concerning the violation of school standards and that each "school board . . . shall hold its pupils strictly accountable for any disorderly conduct in school, on the school grounds, in a school bus or at a school function." Ark. Stat. Ann. § 80-1629.4. Under the statute delineating the general powers and duties of school boards, each is required to "do all things necessary and lawful for the conduct of an efficient free public school or schools in the district." Ark. Stat. Ann. § 80-509(m).

Having found that Section 11 of the Policies was wrongfully applied to the charges against plaintiff, we need not determine whether or not its mandatory penalty is unconstitutional. We also have pointed out that Section 10 does not mandate suspension and we call attention to *Paine* v. *Board of Regents*, 355 F.Supp. 199 (W.D. Tex. 1972) *aff'd* 474 F.2d 1397 (5th Cir. 1973), which held unconstitutional a school regulation which mandated suspension for any student criminally convicted of a drug offense.

Having found that plaintiff's suspension following the October 29 hearing was in violation of his right to substantive due process, we hold that the suspension order of October 29, 1980, is void; that plaintiff must be deemed to have been reinstated as of October 29, 1980, and to have received academic credit for the semester. The defendants are ordered to make the changes

in plaintiff's record and to expunge all references to the October 29 suspension. The summary suspension of October 22, 1980, has not been challenged.

The Clerk will prepare a judgment in accord with this opinion which declares plaintiff's October 29, 1980, suspension from the Rogers High School to be void, and a decree which orders the defendants to make the necessary changes in plaintiff's record and to expunge all references to the October 29, 1980, suspension from his record.

This 9 day of January, 1981.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-1132

Pete McCluskey, By His Next Friend Sally McCluskey,
Appellee,

vs.

The Board of Education of Rogers, Arkansas; Oliver Adams, Bob Crafton, Marion Bunyard, John Sampier, Carl Baggett, Greer Lingle and Dr. Bill King,
Appellants.

Appeal from the United States District Court
for the Western District of Arkansas.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestons for rehearing en banc denied by an equally divided Court. Judges Lay, Henley, McMillian and Arnold would grant the petition for rehearing en banc.

November 25, 1981

Opposition

81-1577

No.

Office - Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF ROGERS, ARKANSAS; OLIVER ADAMS; BOB CRAFTON; MARION BUNYARD; JOHN SAMPIER; CARL BAGGETT; GREER LINGLE and DR. BILL KING,
Petitioners,

vs.

PETE MCCLUSKEY, By His Next Friend, Sally McCluskey,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court may properly invalidate, on substantive due process grounds, a public school board's decision to expel a student for being intoxicated under a mandatory expulsion provision of a regulation which applies only to drugs and narcotics and expressly excludes alcohol, although no denial of procedural due process is found?

2. Whether a federal court may properly invalidate the application of a mandatory expulsion and loss of credit provision, contained in a regulation which deals solely with narcotics and drugs and expressly exempts alcohol, to a student involved in an alcohol related offense despite the fact that the Board's regulations concerning alcohol authorize a maximum penalty of suspension or expulsion.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF ROGERS, ARKANSAS; OLIVER ADAMS; BOB CRAFTON; MARION BUNYARD; JOHN SAMPIER; CARL BAGGETT; GREER LINGLE and DR. BILL KING,

Petitioners,

vs.

PETE MCCLUSKEY, By His Next Friend, Sally McCluskey,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the Eighth Circuit

JURISDICTION

In petitioner's jurisdictional statement petitioner states that the finding of the district court was "that the respondent was denied substantive due process when he was suspended by the Rogers Public School Board for his violation of a disciplinary rule which prohibits the use or possession of alcoholic beverages on school premises or at school related activities."

This statement is inaccurate as the finding of the district court, which was affirmed by the court of appeals, was that

respondent was expelled by the Board for an alcohol related offense under a regulation which mandates expulsion with loss of credit and applies solely to drugs and narcotics, *expressly exempting* alcohol from its purview. The cases cited by the petitioner as being in conflict with the opinion sought to be reviewed do not in fact conflict with the decision in this case. The court of appeals held that the district court had correctly distinguished *Wood* v. *Strickland,* 420 U.S. 308 (1975) from the case at bar. The other cases cited by petitioner simply are not in point.

STATEMENT OF THE CASE

Again petitioner asserts that the "suspension" was the "result of McCluskey's violation of a rule which prohibited any student to use any alcoholic beverage." This again is inaccurate as the rule under which Pete McCluskey was expelled was Section 11 of the Board's regulations which dealt solely with drugs and narcotics and expressly exempted alcohol from its terms.

Petitioner's statement of the case states that the Board merely "affirmed the suspension" imposed by the superintendent of schools. In fact, the original suspension was a temporary one, pending the hearing, at which time the Board imposed expulsion for the semester with loss of credit under Section 11 of its regulations.

REASONS FOR DENYING THE WRIT

Pete McCluskey was expelled by the Rogers Board of Education under Section 11 of its own regulations. That regulation mandates expulsion for the semester, with loss of credit. Section 11 applies to drugs and by its terms expressly excludes alcohol from its purview.

In *Goss* v. *Lopez*, 419 U.S. 565 (1975) this Court held that the right to an education may not be withdrawn by a state on grounds of misconduct, absent fundamentally fair procedures.

> The authority possessed by the state to prescribe and enforce standards of conduct in its schools although concededly broad, must be exercised consistently with constitutional safeguards. . . . The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," the minimal requirements of the clause must be satisified. (Page 574)

> The student's interest is to avoid unfair or mistaken exclusion from the education process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interests and the interest of the state if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. (Page 580)

The district court in the case at bar held that respondent was denied substantive due process by the expulsion and the court of appeals agreed. We submit to this Court that the precise holding in this case is that a board of education may not apply a mandatory expulsion penalty contained in a board regulation which

deals solely with drugs and expressly excludes alcohol from its coverage, to a student involved in an alcohol related incident.

We believe it pertinent that Arkansas law also prohibits artibrary or unreasonable board action in expulsion cases. *Fortman* v. *Texarkana School District,* 257 Ark. 130, 514 S.W. 2d 720 (1974); *Williams* v. *Board of Ed., Etc.,* 626 S.W. 2d 361 (1982).

We believe that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits local boards of education from acting arbitrarily or patently unreasonably in expulsion proceedings. *Goss* v. *Lopez, supra; Strickland* v. *Inlow,* 495 F. 2d 186 (8th Cir., 1973); *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Mitchell* v. *Board of Trustees,* 625 F. 2d 660 (1980); *St. Ann* v. *Palisi,* 495 F. 2d 423 (1974); *Cook* v. *Edwards,* 341 F. Supp. 307 (D.N.H. 1972); *Lee* v. *Macon County Board of Education,* 490 F. 2d 458 (1974); *Paine* v. *Board of Regents,* 355 F. Supp. 199 (1972).

Most of the cases cited by petitioner are not student expulsion cases, but rather "nontenured teacher cases". *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Scheelhaase* v. *Woodbury Central Community School District,* 488 F. 2d 237 (8th Cir., 1973), cert. denied, 417 U.S. 969 (1974); *Mt. Healthy* v. *Doyle,* 429 U.S. 274 (1977); *Jeffries* v. *Turkey Run Consolidated School District,* 492 F. 2d 1 (7th Cir., 1974); *Freeman* v. *Gould Special School District,* 405 F. 2d 1153 (8th Cir., 1969), cert. denied, 396 U.S. 843 (1969). The distinction between the nontenured teacher cases and the case at bar is that nontenured teachers have no property or liberty interests in continued employment which would be protected under the Fourteenth Amendment. See, e.g., *Roth, supra.* The public school student in an expulsion situation, on the other hand, has "property" and "liberty" interests that are protected under the Due Process Clause of the Fourteenth Amendment. *Goss* v. *Lopez, supra.*

Neither is the decision of this Court in *Board of Curators* v. *Horowtiz,* 435 U.S. 78 (1978) in conflict with the decision below. In *Horowitz* this Court carefully distinguished between situations involving suspension or expulsion for disciplinary reasons and dismissals for academic reasons and held that *Goss* was not applicable in an academic dismissal setting. However, even in the academic dismissal situation this Court implied in *Horowitz* that an arbitrary or capricious dismissal might be impermissible.

All of the other cases cited by petitioner, with the exception of *Wood* v. *Strickland,* 420 U.S. 308 (1975), are much further afield than *Horowitz* or the nontenured teacher cases cited above. Petitioner places great emphasis on *Wood* and is correct that the facts of *Wood* are superficially similar to the case at bar. The court of appeals held:

> The Board argues that *Wood* prevents the court from concluding that the Board could not legally construe Section 11 to be applicable to alcohol offenses. The Supreme Court stated that "§1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975). The Board contends that the district court's rejection of the Board's interpretation of Section 11 as applying to alcohol offenses is similar to the court of appeals in *Wood* substituting its judgment for the board in ruling that a regulation prohibiting "intoxicating" beverages must incorporate the state's statutory standards and thus require proof that the beverage is legally intoxicating. Since in *Wood* the Supreme Court reversed the court of appeals and ruled that the board could apply its regulation to any beverage containing alcohol, the *McCluskey* Board argues that it likewise has the freedom to interpret its Section 11 regulation and it can construe it to apply to alcohol. See *Wood* v. *Strickland, supra,* 420 U.S. at 323-28.

> We hold that the district court correctly distinguished *Wood* by stating that the *Wood* board's construction of the regulation was a reasonable one while the *McCluskey* Board's construction of Section 11 is unreasonable. We cannot agree with the Board that it can apply Section 11's mandatory expulsion penalty to a student involved in an alcohol case when the express terms of Section 11 apply only to "drugs" and expressly exempt alcohol. *McCluskey* v. *Board of Education,* 662 F. 2d 1263 (8th Cir., 1981).

Finally, petitioner argues that since the same result *could* have been reached under Section 10 of the Board's regulations the district court erred in invalidating the expulsion.

Section 10 lists all those offenses which may constitute sufficient cause for expulsion. This is the only section of the Board's regulations which deal with alcohol related offenses and include other offenses such as insubordination, habitual uncleanliness, abnormal or irrational behavior, distribution of hand written or printed material on school premises which interferes with or disrupts the educational process, and a number of other things. As the district court stated Section 10 does not mandate expulsion. Neither does it address the issue of whether or not academic credit is to be lost by the student.

In contrast, Section 11, the section of the Board's regulations dealing with drugs and narcotics mandates expulsion for the remainder of the semester with loss of credit. This is the section under which Pete McCluskey was expelled. It is by no means certain that respondent would have been expelled for the semester with loss of credit had the Board in this case not felt bound by the mandatory expulsion provison of Section 11, as there were quite definitely mitigating circumstances.

Petitioner fears "the specter of unlimited challenges to every disciplinary action within the administration of public schools which adversely affects an individual on the grounds that it is

'arbitrary', 'capricious', or 'unreasonable'." We do not interpret the holding of the court of appeals so broadly. This case simply stands for the proposition that boards of education, in student expulsion cases, are not free to patently misapply their own regulations.

CONCLUSION

It is submitted that no conflict whatsoever exists between the case at bar and any of the cases cited by the petitioner and that the holdings of the district court and the court of appeals below were clearly correct. For these reasons we believe the petition for a writ of certiorari should be denied.

Respectfully submitted,

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